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No. 03-1046

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Whether a company who systematically overcharges its customers can evade judicial review by falsely labeling the overcharge a tax?

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JURISDICTION

AT&T contends that this Court's jurisdiction is invoked under 28 U.S.C. § 1257 because "the federal issue - whether an Oklahoma court has the power to entertain claims arising out of the tax collection process in other states - has been finally decided . . .". However, because the claims asserted in this case do not challenge any state tax laws, no federal question was decided.

In addition, several other judicially promulgated rules demonstrate that it is inappropriate for this Court to grant certiorari review. First, the opinion is unpublished and has no precedential value. Further, the ruling is interlocutory in nature and does not constitute a final judgment. Finally, review at this stage will not serve the interests of judicial economy because a decision will not put an end to the litigation, and could only serve to impact a small number of

states while resulting in substantial costs and delays to the Class. Each of these points is addressed below.

AT&T attempts to overcome the non-final nature of the opinion below by arguing that the lower courts have "finally decided" that Oklahoma state courts have the power to entertain claims arising out of the tax collection process in other states. This is simply not true. Plaintiffs do not challenge any state tax statutes. Both the trial court and the Oklahoma Court of Civil Appeals found that this is not a suit for a "tax refund." After reviewing substantial evidence, including *ore tenus* testimony, the trial court decided a mixed question of fact and law holding:

> The amounts charged ***were not a "tax"*** simply because AT&T charged such amounts under the guise of a tax. Because this is ***not an action for a tax refund***, Plaintiffs were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a (emphasis added). Respecting the trial court's discretion, the Court of Civil Appeals examined the issue and found that this is not a tax refund action stating:

> Finally, AT&T asserts that the tax laws of each state reveal variations in the limitations period regarding tax refunds, rendering the claims of these Oklahoma residents atypical. We find the argument without merit because, as reasoned above, ***this is not an action to obtain a sales tax refund.***

App. 13a (emphasis added).

Accordingly, AT&T's argument that the Oklahoma courts decided they have the "power to entertain claims arising out of [the] tax collection process in other states" is simply incorrect. The facts of this case do not squarely present the issue stated by AT&T. It would not be prudent to utilize this case to decide the issue of whether a state court can adjudicate claims arising out of the tax laws of sister states

when the opinions below specifically found Plaintiffs' claims do not challenge the tax laws of any state. This Court should decide such a question only where a state court is attempting to hear a challenge to the tax laws of a sister state and true issues of state sovereignty are implicated. The alleged federal issue that AT&T depicts simply does not exist under the facts of this case.

Second, this opinion does not warrant discretionary certiorari review because it is an unpublished opinion from an intermediate state court with absolutely no precedential value beyond the case itself. Indeed, Oklahoma law expressly prevents this type of unpublished opinion from being cited as having any precedential value whatsoever. *See* Okla. Stat. Ann., tit. 20, § 30.5 (West 2003) (providing that "[n]o opinion of the Court of Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the Justices of the Supreme Court for publication in the official reporter . . . ."); *see also Russell v. Atlas Van Lines, Inc.*, 411 F. Supp. 111, 113 (D. C. Okla. 1976) (refusing to recognize pronouncements in unpublished Oklahoma Court of Civil Appeals decision because, as it had not been approved for publication by a majority of the justices of the Oklahoma Supreme Court, it had no precedential value). All of AT&T's arguments supporting this Court's accepting review are based on the assertion that doing so would resolve an alleged conflict. However, because the opinion below is unpublished, it cannot be "binding or cited as precedent." Okla. Stat. Ann., tit. 20, § 30.5. Therefore, all of AT&T's arguments must fail.

Third, this Court should not exercise jurisdiction pursuant to 28 U.S.C. § 1257 because the decision below is interlocutory. *See Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 343 (Okla. 1998) (stating that Oklahoma courts are prohibited from making any ruling on the merits prior to ruling on class certification). In fact, the trial court's order

granting class certification may be altered or amended before a decision on the merits. Okla. St. Ann. tit. 12, § 2023(c). As Justice Scalia has recognized, interlocutory appeals such as this are generally not good vehicles for deciding questions on certiorari. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.) (noting that this Court will "generally await final judgment . . . before exercising [its] certiorari jurisdiction.").

This Court's reluctance to hear interlocutory appeals serves several important purposes. One is to emphasize the deference that appellate courts pay to the trial courts deciding the many questions of law and fact that occur in the course of a proceeding. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (stating that piecemeal appeals undermine the independence of trial courts). Here, the class certification determination was made after a full evidentiary hearing that included volumes of evidence and the testimony of multiple live witnesses after years of litigation. The trial court's decision was then reviewed by the Court of Civil Appeals and reviewed again on rehearing with both opinions affirming the certification. Thereafter, the Oklahoma Supreme Court denied AT&T's writ of certiorari after additional briefing. Thus, this Court should reject this interlocutory appeal in deference to the courts below.

Finally, AT&T contends that this Court should grant review to prevent "long and complex litigation," arguing that its jurisdictional argument brings this case within the exception that sometimes warrants review of interlocutory appeals. Petition at 3-4. This narrow exception, though, is logically employed in cases where jurisdiction resolves the question of where or whether the case will continue in litigation. *See, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

Here, even if this Court were to accept jurisdiction and rule completely in AT&T's favor, this class action would continue. Notably, AT&T does not challenge the authority of the Oklahoma courts to resolve the claims of all Oklahoma class members (Petition at 5, n.2), and therefore regardless of any decision by this Court, the class action including the Okalahoma class members will go forward. Thus, the primary policy underlying the occasional review of interlocutory appeals based on jurisdiction is not present here. Therefore, this interlocutory appeal should be rejected because it will not serve the interests of judicial economy, but rather, would be inefficient, expensive, and would not end the litigation.

In sum, this Court should refrain from exercising jurisdiction because this appeal is of an intermediate state court opinion that does not involve a federal question, is unpublished and interlocutory. Finally, even if the Court accepted review and resolved the case wholly in AT&T's favor, it would not end the litigation. Certainly, the arguments raised by AT&T are not sufficient to warrant this Court's limited review under 28 U.S.C § 1257.

INTRODUCTION

The central dispute in this case involves Petitioner AT&T Corp.'s ("AT&T") refusal to properly determine the actual location of its customers because, in its view, it is too expensive to do so. Respondents, Bobby Gene Allen and Deborah Jane Allen, on behalf of themselves and all others similarly situated ("Plaintiffs") seek to enjoin AT&T from improperly identifying customers within AT&T's billing system as living within city limits. The suit also seeks to force AT&T to stop improperly charging customers amounts designated as a city "tax" when AT&T knows it is improperly collecting these fees from customers residing outside the city limits. AT&T admits that customers residing outside the limits of the taxing jurisdiction should not be charged a fee

for city tax. However, AT&T fails to take reasonable steps to accurately categorize its customers, and as a result, millions of AT&T's customers are being improperly overcharged.

It should also be noted that Plaintiffs' claims do not impact any state's ability to collect taxes and do not challenge the validity of any tax law. Plaintiffs have not sued any taxing entity and seek no refund from any state treasury. Indeed, Plaintiffs' claims focus exclusively on AT&T's internal billing practices and procedures and stem from Plaintiffs' contractual relationship with AT&T. The true reason AT&T attempts to improperly couch this case as a "tax refund" case is to force each individual taxpayer to exhaust administrative remedies before various administrative bodies that do not provide for class actions - an obstacle that AT&T knows will effectively destroy any remedy for its customers.

STATEMENT OF THE CASE AND FACTS

The opinion of the Oklahoma Court of Civil Appeals adequately sets forth the facts of this case. Petitioner's Appendix ("App.") 1a-17a. A more detailed description of the facts is set forth in the trial court's Order Granting Class Certification. App. 34a-58a. Plaintiffs will not replicate those discussions here. Nonetheless, several key facts that will aid this Court in its review are highlighted below.

AT&T has a billing system that categorizes each of its customer's addresses. It assigns each customer a "geo-code" or designation that determines which charges apply to the customer's service location. Part of this system involves an "Outside City Limits" or "OCL" indicator which tells AT&T's system whether the customer lives inside or outside the city limits. All customers with the OCL indicator marked "N" are supposed to reside inside the city limits. Conversely, if the OCL indicator is marked "Y" then the customer is categorized as living outside the city limits.

Whether a customer lives inside or outside the city limits is important for billing purposes because Oklahoma law requires municipal taxes to only be charged to those individuals who reside within the city limits of the municipal taxing jurisdiction. This basic tenant of taxation, of course, holds true in every state. When AT&T's system incorrectly categorizes a customer as residing within the city limits, a city tax is applied to long distance calls made by that customer. For example, a resident of Muskogee, Oklahoma is required to pay a 4.5% state sales tax and an additional 3.25% Muskogee city sales tax for a combined tax rate of 7.75%. By contrast, all AT&T customers who reside in the unincorporated area outside the city limits of Muskogee are only required to pay the Oklahoma state sales tax of 4.5% and are not legally obligated to pay the Muskogee city sales tax of 3.25%. Because AT&T's system fails to delineate individual taxes and simply lumps them together under the heading "local taxes," it is virtually impossible for a customer to realize when he or she is being overcharged.

This case involves millions of AT&T customers who AT&T has incorrectly categorized as living inside the city limits when, in fact, they live outside the city limits. AT&T admits that its system miscategorizes both business and residential customers in this manner. Because of the current complexity of AT&T's bills, it is nearly impossible for an average customer to know that the line item labeled "local tax" may include an overcharge.

OPINIONS BELOW

Plaintiffs filed a class action complaint challenging AT&T's internal billing procedures. Plaintiffs contend that AT&T breached its contract with its customers by imposing improper charges against them. Plaintiffs also filed an equitable claim for restitution, as well as claims for injunctive and declaratory relief. Each of these claims focus exclusively on AT&T's internal billing practices and AT&T's contractual

obligations to its customers. Plaintiffs do not challenge any tax ordinance or tax collection practice. Plaintiffs do not seek a tax refund from any state treasury and have not sued any state taxing agency.

The trial court repeatedly rejected AT&T's attempt to portray this as a suit for tax refund:

> This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motions to Dismiss. This is the law of the case. Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. In this Court's view, the Defendant's arguments raised on the Motions to Dismiss . . . are untenable. The amounts charged were not a "tax" simply because AT&T charged such amounts under the guise of a tax. Because this is not an action for a tax refund, Plaintiffs were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a.

After determining that requirements of numerosity, commonality, typicality, and adequacy were satisfied, the court certified its first class pursuant to Okla. Stat. tit. 12, § 2023(B)(2) (2001). In doing so, the court determined that certification of the injunctive and declaratory relief claims was appropriate under Rule 2023(B)(2) because "[t]he primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future." App. 51a.

In addition to the Rule 2023(B)(2) class, the trial court certified a second class pursuant to Rule 2023(B)(3). Despite AT&T's repeated attempts to couch this case as a suit for a "tax refund," the trial court correctly focused on AT&T's billing procedures:

> At the center of this case is AT&T's billing procedures. Regardless of minor variations in the factual circum-

> stances of absent class members, if AT&T's billing procedures are demonstrated to be flawed as they pertain to the Allens, then the class action mechanism will serve to adjudicate this issue for thousands of people.

App. 53a.

AT&T appealed the class certification to the Oklahoma Court of Civil Appeals. On appeal, AT&T's primary argument was similar to that raised here: trial courts are without jurisdiction to hear tax refund suits. Like the trial court, the Court of Civil Appeals disagreed with AT&T's characterization of the suit, finding that it "is not an action to obtain a sales tax refund." App. 13a. The court also determined that most AT&T customers would not even know they were being overcharged, and that those customers that did discover the overcharge "would not be able to prove individual claims before the OTC or other taxing authorities without access to AT&T records." As a result, the court found that the administrative remedies, even if applicable, "would likely present an insurmountable barrier to the individual customer seeking redress." App. 6a.

Thereafter, AT&T filed a Petition for Writ of Certiorari in the Oklahoma Supreme Court asserting that the Oklahoma courts did not have jurisdiction over the claims of class members residing outside the state of Oklahoma. The Oklahoma Supreme Court denied the Petition. AT&T now requests that this Court grant Certiorari review of the unpublished interlocutory opinion from the Oklahoma Court of Civil Appeals.

SUMMARY OF THE ARGUMENT

In an attempt to entice this Court into accepting review, AT&T has misconstrued the facts of several cases it relies upon. Specifically, AT&T asserts that this Court should grant review because, it contends, the decision of the Oklahoma Court of Civil Appeals conflicts with opinions of the highest

courts in Arkansas and New York. However, the authority AT&T offers in support of its contention are misquoted and mischaracterized. First, AT&T cites *Ferguson v. Kroger Co.*, 37 S.W.3d 590 (Ark. 2001), for the proposition that "a state court is without jurisdiction to order other state treasuries to refund tax revenues." Petition at 12. Contrary to AT&T's representation, the Arkansas Supreme Court specifically stated that in light of its affirmance on another ground, it "*need not address* the trial court's findings that it lacked subject-matter jurisdiction to order other state treasuries to refund tax revenues . . . .". *Id.* (emphasis added). In any event, *Ferguson* is distinguishable from this case because Plaintiffs here are not seeking any funds from any state treasury.

AT&T also improperly cites *dicta* as the holding in *City of Philadelphia v. Cohen*, 184 N.E. 2d 167 (N.Y. 1962). AT&T fails to recognize that the discussion in *Cohen* referenced New York's position before the New York Legislature enacted a law directing New York courts "to recognize and enforce liabilities for taxes lawfully imposed by any other state or any political subdivision." *Id.* at 170.

Likewise, the opinion below does not conflict with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because the law is consistent when the administrative remedy is futile to pursue. Moreover, the cases cited by AT&T are distinguishable from the case at bar because here, Plaintiffs are not seeking a "tax refund," do not challenge any tax laws, and focus exclusively on AT&T's billing procedures. In contrast, the plaintiffs in each case AT&T cites were either challenging a specific tax law or seeking a tax refund from state treasuries.

Finally, the decision below is consistent with a recent opinion from Illinois on virtually identical facts. The Illinois Court of Appeals in *P.J.'s Concrete Pumping Service, Inc. v.*

Nextel West Corp., 803 N.E.2d 1020 (Ill. App. Ct. 2004) affirmed certification in a similar case where *Nextel* charged its customers local taxes based exclusively upon the customer's zip code. Like AT&T, *Nextel* argued that the Illinois court was without jurisdiction over the claims of class members residing outside Illinois. The Illinois Court of Appeals rejected this argument, reasoning that "plaintiff's claim is not about the tax ordinances of the local governments on whose behalf defendant collected the taxes [but instead] . . . is about defendant's billing practice of relying only on a customer's zip code to determine whether the customer owed a tax." *Id.* at 1031. The same distinction applies here because Plaintiffs' claims focus exclusively on AT&T's internal billing practices.

REASONS FOR DENYING THE WRIT

I. THE OKLAHOMA COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE SUPREME COURTS OR OF THIS COURT AND NO STATE'S SOVEREIGNTY IS CHALLENGED.

AT&T initially asserts that this Court should grant review because, it contends, the decision of the Oklahoma Court of Civil Appeals conflicts with opinions of the highest courts in Arkansas and New York. The two cases cited do not represent a true conflict because they are factually distinguishable and further, do not stand for the proposition argued by AT&T.

First, AT&T cites the Arkansas Supreme Court case of *Ferguson v. Kroger Co.*, 37 S.W.3d 590 (Ark. 2001) for the proposition that "a state court is without jurisdiction to order the treasuries of other states to refund tax revenues." Petition at 12. However, AT&T materially misquotes the *Ferguson* opinion. In *Ferguson*, plaintiffs filed a multi-state class action complaint related to Kroger's "double-coupon" adver-

tising campaign. *Id.* at 591. Although Kroger advertised that it would double the value of manufacturer's coupons on certain days, it discounted the value of the coupons by the amount of sales tax that was owed to the state. *Id.* at 591. The trial court denied class certification for a number of reasons including the fact that it believed it lacked jurisdiction to order the treasuries of other states to refund taxes. *Id.* at 592. On appeal, the Arkansas Supreme Court affirmed the denial of class certification because the plaintiff did not adequately define the class. *Id.* at 594. The court specifically declined to rule on jurisdiction.

> [W]e recognize that we are affirming the trial court for a different reason than what it specified in its order. . . . Because we are affirming on the basis of the Ferguson's failure to define the class sufficiently, we *need not address* the trial court's findings that it lacked subject-matter jurisdiction to order other state treasuries to refund tax revenues . . . .

Id. at 595 (emphasis added). Thus, the Oklahoma Court of Civil Appeals' decision does not conflict with the Arkansas Supreme Court's opinion in *Ferguson* because the Arkansas Supreme Court specifically declined to address the very issue AT&T erroneously claims is in conflict.

AT&T next argues that the decision of the Oklahoma Court of Civil Appeals conflicts with the New York decision, *City of Philadelphia v. Cohen*, 184 N.E. 2d 167 (N.Y. 1962). AT&T cites *Cohen* for the proposition that Oklahoma courts lack the authority to render any decision involving tax-related matters in another jurisdiction. Petition at 14. Again, AT&T's argument is decidedly at odds with the decision of the *Cohen* court. The issue before the court in *Cohen* was whether "the full faith and credit requirement of the Federal Constitution (art. IV, § 1) *requires* the courts of a State to entertain an action brought to enforce a defendant's alleged liability, not reduced to judgment, under the laws of another state?" *Id.* at 189 (emphasis added). In other words, the

court in *Cohen* was deciding whether it was *required* to take the case, rather than, as AT&T asserts, whether it had the *authority* to take the case. *Id.* (emphasis added). Philadelphia asked the New York court to entertain an action arising under Pennsylvania tax law against a former Pennsylvania resident who moved to New York while owing taxes to Philadelphia. *Id.* at 190. The New York high court decided it was not required to take the case because New York only provides such comity to foreign jurisdictions that reciprocate with New York. *Id.* at 192. The court would have entertained the case had it been filed by any one of 27 states that had agreed to provide New York with similar provisions. *Id.* Because Pennsylvania had not enacted a similar provision, New York declined to take the case. *Id.* Thus, *Cohen* does not hold that state courts lack the inherent authority to examine claims relating in any way to taxation in other states as AT&T argues. To the contrary, the New York court stated that it would have exercised its judgment had Pennsylvania provided it the same remedy. *Id.* at 192. Most importantly, *Cohen* is distinguishable from this case because here, no claim arising under the tax laws of any state is asserted. Because the facts of *Cohen* are so clearly distinguishable from this case, AT&T's argument that the two opinions conflict is meritless.

AT&T also cites a number of opinions from this Court involving constitutional challenges to state tax laws. Petition at 12-14. AT&T does not assert that these cases conflict with the opinion below. Instead, AT&T appears to cite these cases for the general proposition that state sovereignty prohibits courts of one state from adjudicating claims under the tax laws of another state. Petition at 13. This case does not challenge any state's tax laws but exclusively challenges AT&T's billing practices

In contrast, every one of these cases AT&T relies on involved a taxpayer challenging the validity of a state tax and the suit was brought against that state. *See e.g., National*

Private Truck Council, Inc., v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) (class action brought on behalf of nonresident motor carriers challenging constitutionality of retaliatory/third-tier taxes imposed on non-Oklahoma residents operating foreign-based motor carriers); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) (wholesale liquor distributors challenging constitutionality of Florida excise tax which gave preferential treatment to beverages manufactured from Florida-grown citrus and other agricultural crops and then bottled in state). In principle, Plaintiffs agree that courts of the state imposing a tax should determine its validity. However, as explained more fully below, Plaintiffs here never challenged any tax law on any ground and only seek relief based upon their contractual relationship with AT&T. As a result, these cases are distinguishable and inapplicable.

AT&T's argument that the decision of the Oklahoma Court of Civil Appeals conflicts with the opinions of the highest courts in New York and Arkansas or with opinions from this Court is without merit because the cases cited by AT&T are distinguishable for the reasons stated above. Certiorari review is not warranted here because no conflict exists and because the facts of this case do not present the issue as depicted by AT&T.

II. THE DECISION BELOW DOES NOT "THREATEN" STATE SOVEREIGNTY BECAUSE PLAINTIFFS ONLY SEEK REDRESS FOR AT&T'S IMPROPER BILLING PRACTICES, NOT A "TAX REFUND."

Both the trial court and the appellate court determined that this is not a tax refund case. AT&T argues that the decision below conflicts with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because the trial court failed to examine how

administrative procedures for obtaining a tax refund vary from state to state. AT&T asserts that analyzing the administrative tax refund procedures of each state would demonstrate that certification is improper due to conflicts of state law. This argument is without merit because (1) the administrative remedies for obtaining a tax refund do not apply here because this is not a tax refund case; and (2) there is no material conflict between Oklahoma law and the law of the four jurisdictions cited by AT&T.

A. Variation in administrative remedies for tax refunds among states does not create a conflict with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because this is not a tax refund case.

Although AT&T couches its argument as a conflict with *Shutts*, in reality, AT&T asks this Court to overturn the trial court's finding that this is not a tax refund case. AT&T argued to the trial court that this was a tax refund case requiring application of exclusive administrative remedies. Plaintiffs responded that they were not seeking a tax refund, but rather, they sought to remedy the reoccurring problems within AT&T's billing system that resulted in millions of overcharges. After reviewing AT&T's two motions to dismiss and briefs on class certification; after hearing oral testimony of witnesses; after examining voluminous documents; and after hearing argument of counsel at the certification proceeding, the trial court determined a mixed question of law and fact that this was not an action for a tax refund. The trial court addressed this point directly in its order on class certification:

> This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motion to Dismiss. . . . Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. . . . Because this action is not an action for a tax refund, Plaintiffs

> were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a.

The Oklahoma Court of Civil Appeals was likewise not persuaded by AT&T's depiction of the facts, and plainly stated in its opinion that "[t]his is not an action to obtain a state sales tax refund." App. 13a. Thus, the trial court and the Court of Appeals determined that Plaintiffs are not seeking a tax refund. AT&T improperly asks this Court to replace its judgment for that of the lower courts' and determine otherwise. Absent this Court's willingness to do so, the application of administrative remedies for tax refund actions does not apply. Because the laws alleged to be in conflict are inapplicable, AT&T's alleged conflict is a distinction without a difference.

In a recent factually analogous case, another defendant telecom company attempted to characterize similar claims as a tax refund action. In *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 803 N.E.2d 1020 (Ill.App.Ct., 2004), the Illinois Court of Appeals squarely rejected that characterization. Like AT&T, *Nextel* incorrectly categorized thousands of customers within its internal billing system. *Id.* at 1020. Consequently, those customers were overcharged under the guise of a city tax that could never have been properly charged to them because they did not reside within the city limits. *Id.* The trial court certified a 17 state class. On appeal, *Nextel* raised the same "tax refund" argument AT&T advances here. *Id.* The Illinois Court of Appeals rejected this argument:

> Defendant argues that a class action is inappropriate here because the Illinois courts do not have the power to regulate the tax collection procedures in jurisdictions outside Illinois. As we stated earlier, however, plaintiff's claim is not about the tax ordinances of the local governments on whose behalf defendant collected the

> taxes. Instead, this claim is about defendant's billing practice of relying only on a customer's zip code to determine whether the customer owed a tax.

Id. at 1031.

The distinction the Illinois Court of Appeals found in *Nextel* is present here. Plaintiffs' claims are "not about the tax ordinances of the local governments on whose behalf defendant collected the taxes." *Id.* At a minimum, the *Nextel* decision shows uniformity between the states of Oklahoma and Illinois under factually identical circumstances.

B. There is no material conflict between the law of Oklahoma and the laws of the other states referenced by AT&T.

1. *There is no material conflict because the administrative remedy is futile, inefficient, or cannot grant the relief requested.*

In *Shutts*, this Court explained that the law of the forum state can be applied to claims arising in other jurisdictions if the law of the forum state does not materially conflict with the law of any other jurisdiction connected to the suit. 472 U.S. at 797, 823. Because no conflict exists, it was proper for the court to apply Oklahoma law.

AT&T argues that Pennsylvania, Texas, New York, and Florida give exclusive jurisdiction over tax refund claims to administrative bodies and that the decisions of the Oklahoma courts conflict with the substantive and procedural law in those states. However, none of these four states' laws actually conflict because, like Oklahoma, none of those states require futile administrative remedies to be exhausted.

The laws of Pennsylvania, Texas, New York, and Florida are wholly consistent with Oklahoma law regarding exceptions to the exhaustion of administrative remedies doctrine. Oklahoma law states that "administrative remedies need not

be exhausted if they would be ineffective, unavailable, or futile to pursue." App. 6a (citing *Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality*, 61 P.3d 219, 221 (Okla. 2002)). The Supreme Court of Pennsylvania recognizes that "exhaustion will not be required when the administrative process is not capable of providing the relief sought." *Ohio Cas. Group of Ins. Cos. v. Argonaut Ins. Co.*, 525 A.2d 1195, 1197-98 (Pa. 1987). Texas courts also recognize that administrative requirements need not be exhausted if their strict application would produce "an exercise in futility." *Sharp v. International Bus. Machs. Corp.*, 927 S.W.2d 790, 795 (Tex. App. 1996). New York follows suit by holding that administrative procedures need not be followed when "an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury." *Watergate II Apartments v. Buffalo Sewer Auth.*, 385 N.E.2d 560, 563 (N.Y. 1978) (citations omitted). Finally, in Florida, one "is not required to pursue administrative remedies where such remedies would be of no avail." *Southern Bell Tel. & Tel. Co. v. Mobile America Corp., Inc.*, 291 So. 2d 199, 201 (Fla. 1974).

Under *Shutts*, the law of the forum state can be applied to claims of foreign class members as long as the law of the forum state does not conflict with the laws of other jurisdictions. *Id.* at 817. Here, there is no conflict between the law of Oklahoma and the law of the preceding states when, as here, the administrative remedies are inadequate. The Court of Civil Appeals noted: (1) that most of AT&T's customers would not even know they had been wrongfully charged; (2) that customers would not be able to prove individual claims before "any taxing authority" without access to AT&T records; and (3) that the administrative procedures "would likely present an insurmountable barrier to the individual customer seeking redress." App. 6a. Thus,

exhaustion of administrative remedies was not required under the facts of this case. The court went on to highlight another pivotal reason compelling this result:

> Our preceding analysis leads us to conclude that the administrative remedy is effectively unavailable to these Plaintiffs as well as to the myriad of other potential plaintiffs. But an even more important reason for finding that the Trial Court had jurisdiction is that a primary purpose of Plaintiffs' cause is to obtain injunctive relief, as authorized under 12 O.S. 2001 § 2023(B)(2), to prevent AT&T from continuing to use practices that have resulted in considerable overpayment by customers. The administrative remedy would do nothing to prevent AT&T from continuing to use procedures which resulted in overcharge of its customers and, thus, is insufficient as a remedy.

App. 6a-7a.

As discussed above, futile administrative remedies need not be exhausted in Pennsylvania, Texas, New York, or Florida, just as in Oklahoma. Because there is no conflict between the laws of the forum state, Oklahoma, and those four states, the opinion below does not conflict with *Shutts*.

2. *There is no* Shutts *conflict because the cases cited by AT&T do not involve injunctive and declaratory challenges to billing practices in an on-going contractual relationship.*

For AT&T to demonstrate a conflict as recognized in *Shutts,* it must demonstrate a conflict between the substantive law of the forum state and the law of other involved jurisdictions. In order for true "conflict" to exist, the claims advanced in the cases proffered to demonstrate that conflict must be the same. Here, the cases cited by AT&T challenge the validity of tax laws, assert claims directly against the respective state, and/or seek refunds directly from state

treasuries. By contrast, Plaintiffs here do not challenge the validity of a single tax law, do not sue any state taxing authority, and do not seek funds from any state treasury. Indeed, Plaintiffs' claims stem exclusively from their contractual relationship with AT&T and the manner in which AT&T operates its internal proprietary billing system.

AT&T cites cases from Florida and New York where the plaintiffs actually filed suit against the state and were seeking tax refunds directly from the state treasuries for taxes they asserted were unlawful. These critical facts make those cases obviously distinguishable from the case at bar. In *P.R. Marketing Group, Inc. v. GTE Florida, Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999), the named plaintiff sued the Florida Department of Revenue seeking tax refunds directly from the state treasury, and also sued all Florida local and long distance telephone companies in a defendant class. Plaintiff in *GTE* challenged the "bracket method" of calculating sales tax on long distance telephone calls. *Id.* Because nothing beyond AT&T's contractual obligations and the declaratory and injunctive relief relating to its billing systems are at issue in this case, *GTE* is distinguishable and does not represent a conflict worthy of review.

Likewise, *Davidson v. Rochester Telephone Corp.*, 558 N.Y.S.2d 1009, 1010 (N.Y. App. Div. 1990), is distinguishable from this case because the *Davidson* plaintiffs also sued the state. There, plaintiffs sought tax refunds directly from the New York state treasury and challenged the validity of taxes associated with telephone charges. *Id.* at 1010. Importantly, the *Davidson* plaintiffs did not assert that the phone company's conduct was wrongful in any way. The appellate court found that the collecting company could not be liable where the plaintiffs were challenging the validity of an actual tax that the company had no right to question. *Id.* at 1011. In contrast, Plaintiffs here do not challenge the validity of any tax law. Plaintiffs merely challenge AT&T's internal

billing procedures. They also seek to enjoin AT&T from continuing to improperly classify its customers and overcharge them under the guise of a tax. As a result, contrary to AT&T's assertion, the opinion below does not conflict with *Davidson*.

AT&T also relies on *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex.App.-San Antonio, 1999), in which three grocery stores in a chain inadvertently set the amount of sales tax to be charged to customers at an amount exceeding the legal sales tax rate. *Id.* at 332. Once the error was found, the stores immediately corrected their systems so that no customers would be overcharged in the future. *Id.* The sole issue before the court in *Serna* was the refund of taxes that had been erroneously collected and turned over to the state. *Id.* at 335. The Texas Court of Appeals, San Antonio, held that the taxpayer's sole remedy for receiving such a refund was the administrative remedies available under the Texas Tax Code. *Id.*

The *Serna* decision is distinguishable from this case on two grounds. First, the *Serna* defendant corrected the improper charges and no further improper charges were being incurred. *Id.* at 334. Thus, there was no continuing overcharge to challenge and no injunctive relief sought. Second, the *Serna* parties lacked an ongoing contractual relationship in which the plaintiffs were seeking relief. Here, Plaintiffs and the remaining class members have an ongoing contractual relationship with AT&T, and the erroneous charges can only be corrected by changing AT&T's proprietary billing system. As a result, no true conflict exists between *Serna* and the opinion below because they are distinguishable in important ways.

In addition, a more recent decision of the Texarkana division of the Texas Court of Appeals, *Alford Chevrolet-Geo v. Jones*, 91 S.W.3d 396 (Tex.App.-Texarcana, 2002), supports the decision at issue here. In *Jones,* plaintiffs filed a

class action suit against 600 auto dealerships alleging that the dealerships had improperly charged over one million customers for a tax they did not owe. *Id.* at 399. Rather than requiring plaintiffs to seek a refund from the state as in *Serna*, the Texas Court of Appeals in *Jones* affirmed the trial court's class certification order on the following facts:

> In every case in this class action, the buyer was confronted with an inaccurately described line-item tax that was usually sandwiched in among legitimate taxes payable to the state by the buyer. . . . The allegations are that consumers paid a tax they did not owe because they were billed for the tax by the Dealers.

Id. at 404-05.

Jones is more analogous to this case than *Serna* because like the plaintiffs in *Jones*, Plaintiffs here also challenge the manner in which a business represented local taxes to its customers. Instead of separating charges related to each taxing jurisdiction, AT&T's procedure is to lump together all local taxes so that it becomes virtually impossible for customers to determine whether they are being correctly charged. Indeed, Plaintiffs seek injunctive relief which would require AT&T to delineate each tax individually on its bills so that customers can confirm the accuracy of the charges being applied. Because the decision of the Oklahoma Court of Appeals below follows the more analogous opinion in *Jones*, it cannot be said to conflict with Texas law. At most, *Jones* represents an alternative rationale under Texas law. Simply because the Oklahoma decision below follows the *Jones* rationale over *Serna* does not present an issue worthy of this Court's review.

Finally, AT&T argues that the decision of the Oklahoma Court of Appeals conflicts with the Pennsylvania decision in *Heaven v. Rite Aid Corp.*, 2000 WL 33711049 (Pa. Com. Pl., 2000). However, the Pennsylvania decision is not binding authority on any court and further, is not even permitted to be

cited in a party's brief. *See* Pa. R. Cmmw. Ct. I.O.P. § 414 (2003); Pa. R. Super. Ct. I.O.P. 65.37(A) (2003); *Commonwealth v. Karn*, 650 A.2d 1176 (Pa. Cmwlth. App. 1994) (stating that citation to unreported opinion violated court's internal operating procedures and thus case was not considered by court in reaching decision on appeal); *see also* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473 (Fall 2003). *Heaven* is an unpublished trial court opinion without precedential value beyond the case itself. Accordingly, AT&T's argument that the Oklahoma Court's opinion conflicts with *Heaven* in no way warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully Submitted,

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